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NO. 07-1269

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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

ADVANTAGE MEDIA, L.L.C.,

Petitioner,

v.

CITY OF HOPKINS, MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Whether a plaintiff who obtains a preliminary injunction barring the continued enforcement of an unconstitutional municipal ordinance, followed by a permanent change in conduct by the municipality, is a prevailing party pursuant to 42 U.S.C. § 1988, even though the plaintiff does not ultimately prevail as to any other claims.

SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF GRANTING THE PETITION

Pursuant to Supreme Court Rule 15.8, Petitioner Advantage Media, L.L.C. respectfully submits this Supplemental Brief in support of its Petition for Writ of Certiorari in order to bring to the Court's attention recent authority that bolsters the need for review in this case. In *People Against Police Violence v. City of Pittsburg*, 520 F.3d 226, 231-34 (3d Cir. 2008), the Third Circuit found that a plaintiff that obtains a preliminary injunction prohibiting a municipality from enforcing an ordinance, which prompts the municipality to amend its ordinance rather than seek an appeal, is a prevailing party under 42 U.S.C. § 1988. Similarly, in *Dearmore v. City of Garland*, 519 F.3d 517, 523-25 (5th Cir. 2008), the Fifth Circuit held that the party that obtained a preliminary injunction which prompted an amendment to the city code was a prevailing party under Section 1988, even though the case was ultimately dismissed as moot. The results reached in *People Against Police Violence* and *Dearmore* directly contrast with the Eighth Circuit's decision in this case and further illustrate the split among the circuit courts on this important issue. Therefore, Advantage Media's Petition for Writ of Certiorari should be granted.

Advantage Media's Petition argued that review is necessary in this case to allow this Court to clarify whether its decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), stands for the proposition that a party that obtains a judicially sanctioned change in the legal relationship

through the issuance of a court order, followed by a permanent change in the challenged conduct, qualifies as a prevailing party under 42 U.S.C. § 1988. In *Buckhannon*, even though the Court rejected the pure catalyst theory, it held that where a judicially sanctioned change in the legal relationship between the parties occurred, prevailing party status and an award of fees was appropriate. 532 U.S. at 610. In this case, even though the City's passage of a new sign code was a direct result of the district court's issuance of an injunction in favor of Advantage, the Eighth Circuit found that *Buckhannon* did not allow even a very limited award of attorneys' fees to Advantage. (7a-11a).

The recent decisions of the Third and Fifth Circuits came to the opposite conclusion. In *People Against Police Violence*, the Third Circuit affirmed the district court's finding that a plaintiff who obtained an injunction followed by the enactment of a revised ordinance was a prevailing party and due an award of attorneys' fees. 520 F.3d at 231-34. In reaching this conclusion, the Third Circuit relied upon several decisions that Advantage included in its initial petition. *E.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945 (D.C. Cir. 2005); *Watson v. County of Riverside*, 300 F.3d 1092, 1095-96 (9th Cir. 2002); *Dubec v. Green Oak Township*, 312 F.3d 736, 753, 754, n.8 (6th Cir. 2002). The Third Circuit reasoned that under *Buckhannon* the plaintiff was a prevailing party because this was not an instance where the filing of a lawsuit resulted in a voluntary change in conduct, but rather the change was prompted by a court order. 520 F.3d at 233-34.

The Fifth Circuit reached the same conclusion in *Dearmore*. 519 F.3d at 523-25. There, the court

affirmed the district court's award of attorneys' fees to a plaintiff who succeeded in obtaining a preliminary injunction based on the merits that was followed by an amendment to the municipal code. *Id.* at 524. In affirming the lower court's decision, the Fifth Circuit rejected any assertion that the change in conduct was voluntary. The court found, "[t]he City, however, mooted the case *after* and *in direct response to* the district court's preliminary injunction order. There is an obvious direct causal link between the district court's issuance of the preliminary injunction and the City's subsequent amendment of the Ordinance . . . ." *Id.* at 525.

The contrast between the approach taken by the Third and Fifth Circuits and the approach taken by the Eighth Circuit is evident. Advantage obtained a merits-based preliminary injunction preventing the City of Hopkins from continuing to enforce its Sign Ordinance. (34a-47a). In response to the district court's injunction order, the City did not appeal, but rather enacted a revised sign code aimed at correcting all of the provisions found to be unconstitutional by the district court. *E.g.*, Ordinance No. 2005-954 (City acknowledging that code changes resulted from injunction order) (Exh. B to Dkt. No. 26). Nevertheless, the Eighth Circuit found Advantage was not a prevailing party under *Buckhannon* and not entitled to an award of attorneys' fees under 42 U.S.C. § 1988.

Pursuant to the decisions of the Third, Fifth, Ninth, Eleventh, and District of Columbia Circuits, Advantage would have been awarded attorneys' fees. Granting this petition will allow the Court to address this obvious split among the circuit courts on this very important issue.

WHEREFORE, Petitioner Advantage Media, L.L.C. respectfully requests that this Petition be GRANTED.

DATED this 30th day of April, 2008.

Respectfully submitted,

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